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No. 91-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS., INC., doing business as Baker's Big Star Stores Nos. 31, 61, 64, and 81; GILBERT ALLEN BIG STAR, INC., doing business as Big Star No. 142; SEWELL-ALLEN BIG STAR, INC., Nos. 103, 187 AND 189; SMF MANAGEMENT, INC., doing business as SMF Food Rite Supermarkets,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION 1529, AFL-CIO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION 1529's BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

United Food and Commercial Workers Local 1529, respectfully requests this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

This case involves the coordinated effort of Petitioners Sewell-Allen Big Star, Inc., Baker Bros., Inc., Gilbert Allen Big Star, Inc., Sewell-Allen Big Star, Inc., Nos. 103, 187, and 189, and SMF Management, Inc., (hereinafter "the Companies") to undermine the majority status of the Union, United Food and Commercial Workers Local 1529, AFL-CIO (hereinafter "Local 1529" or "the Union").

The Union originally filed charges alleging violations of §§ 8(a)(5) and (1) of the National Labor Relations Act. 29 U.S.C. § 154 et seq., (hereinafter "the Act"), against each of the Petitioner retail grocery stores for their withdrawal of recognition from and refusal to bargain with Local 1529 follow the expiration of its collective bargaining agreements with Petitioners on October 30, 1982.

Locals 1529 and 452 of the United Food and Commercial Workers International Union merged effective April 1, 1982. Local 1529 notified each of the Petitioners by letter of April 7, 1982 of this merger and of Local 1529's status as representative of the employees formerly represented by Local 452. All Petitioners continued to deal with Local 1529 as before the merger without raising any questions or objections concerning the merger election.

The decision of the Petitioners to withdraw recognition on the basis that the merger was improper was not made until after the Board's decision in *Amoco Production Co.*, 262 NLRB 1240, 110 LRRM 1419 (1982) (that nonmembers must be allowed to vote in an affiliation vote), and at the critical time of contract negotiations for new labor agreements. This Court subsequently held in *NLRB v. Food and Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986), that nonmember employees need *not* be afforded the opportunity to vote on their bargaining representative's decision to affiliate with another Union.

Additional violations of §§ 8(a)(5) and (1) of the Act including numerous unilateral changes relating to the refusal to bargain were alleged against all of the Petitioners; independent violations of §§ 8(a)(1)(3) and (5) of the Act were alleged against Baker Bros., Inc., d/b/a Baker's Big Star Stores Nos. 31, 61, 64, and 81, and Sewell-Allen Big Star, Inc.

Following a hearing, Administrative Law Judge (ALJ) Lawrence W. Cullen found that the Petitioners' withdrawal of recognition and refusal to bargain constituted unfair labor practices in violation of the Act. He further held that Petitioners Sewell-Allen Big Star, Inc., Sewell-Allen Big Star, Inc., No. 2, and Baker Bros., Inc., committed numerous violations of the Act including unilateral changes, discharges and demotions and disregarded the rights of their employees. (A-144). The ALJ further held that Petitioners were precluded from protesting the validity of the merger because of their voluntary recognition of Local 1529 as the successor of Local 452 and their failure to withdraw recognition from the Union until more than six (6) months after voluntary recognition in April of 1982. (A-47-53, A-134). Petitioners were further held to be barred from asserting their defense by the six (6) month statute of limitations of § 10 (b) of the Act. (A-134).

The National Labor Relations Board (hereinafter "Board") issued its Decision and Order on May 31, 1989, adopting the decision of the ALJ in its entirety although modifying the Order recommended by the ALJ. (A-176).

The Sixth Circuit Court of Appeals agreed with the Board that the Union's notice of merger to the Companies was unambiguous and that the Companies were therefore "estopped from challenging the merger because they continued to deal normally with the new Local until the contracts expired." (A-237). The Court noted that Sewell-Allen and Baker Bros. bargained with Local 1529 over an increase in insurance payments, and that all

of the Petitioners continued to remit dues in the usual manner. The Court further agreed with the Board that § 10(b) of the Act prohibited the Company from refusing to recognize the Union based on an allegedly invalid merger if the merger occurred outside the § 10(b) limitations period and the employer continued to recognize the Union. (A-236). The Sixth Circuit further upheld the Board's findings that Sewell-Allen waged an anti-union campaign including soliciting decertification petitions and discharging workers because of their Union activities. The Court also upheld the Board's finding that Baker Bros. was responsible for the statements of its head meat cutters in sponsoring decertification petitions and encouraging employees to get out of the Union. (A-235; A-242). All the Companies were represented and advised to withdraw recognition by the same attorneys. (A-52-53).

Petitioners' statement at footnote 5 on page 4 of its Petition that there has "been no contact with the Union for all these years" is untrue. Moreover, there is no evidence in the record to support this contention and any lack of contact of which Petitioners would have knowledge was occasioned by the Petitioners' unlawful unilateral changes and perpetuation of its unfair labor practices including its refusal to recognize and bargain with Local 1529. (A-129).

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THERE IS NO CONFLICT BETWEEN THE CIRCUITS AND THIS CASE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION OF LAW.

The Sixth Circuit's rejection of Board delay as a basis for overturning the Board's decision and bargaining order in this case does not create a conflict amongst the circuits and does not invoke an important federal law question. The Sixth Circuit Court of Appeals considered Petitioners' reliance on Board delay and cases citing Board delay and determined that it did "not alter the conclusion that Petitioners' defense of an invalid merger is barred and that the Petitioners committed unfair labor practices." (A-242).

This is not a case enforcing a bargaining order issued in the context of a lost union representation election. Rather, this case arises in the context of a concerted and protracted anti-union campaign to deny employees their incumbent Union representation. The Sixth Circuit Court of Appeals determined that delay was not a determinative factor based on the unique circumstances before it.

Texas Petrochemicals Corp. v. NLRB, 923 F.2d 398 (5th Cir. 1991), relied upon by the Companies, involved a *successor's* withdrawal of recognition of the incumbent union based on a questionable polling procedure. The Court, in denying enforcement of the Board's bargaining order, cited an *unsolicited* employee petition rejecting Union representation, as well as the completely unexplained Board delay from the Administrative Law Judge's Order in 1982 to the Board's Order in 1989 as the basis for determining on balance that an election would be the best method of determining employee choice. These circumstances are plainly distinguishable from those at hand as the previous discussion demonstrates. Further, while

the Board had this case under consideration this Court decided *NLRB v. Food and Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986) resolving the issue of whether non-member employees need to be afforded the opportunity to vote on a merger of two (2) unions. The Court's decision that non-member employees need *not* be afforded such opportunity to vote resolved one of the primary issues in the case at hand and accounts for at least part of the delay between the ALJ's decision in June of 1984 and the Board's decision in 1989.

This Court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review." *Fiberboard Corp. v. NLRB*, 379 U.S. 203, 216, 57 LRRM 2609 (1964). The Board's remedies are "for the board to wield not for the courts." *NLRB v. 7-Up Bottling Co.*, 344 U.S. 344, 61 LRRM 2237 (1953). The purpose of a remedial order is to put the parties back to the extent possible to the status quo ante. The Board is not required to place the consequences of its own delays, even if inordinate, upon wronged employees to the benefit of wrong doing employers. *NLRB v. Electric Cleaner Co.*, 315 U.S. 685, 698, 10 LRRM 501 (1942); *NLRB v. Katz*, 369 U.S. 736, 50 LRRM 2177 (1962).

In *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 369 U.S. 258, 116 LRRM 2289 (1969), this Court held that the Court of Appeals had exceed the narrow scope of review provided for the Board's remedial orders when it shifted the cost of Board delay from the company to the employees. Here, the employees have been denied effective representation as a result of the Companies' unlawful refusal to recognize and bargain with the Union, unilateral charges, discharges, demotions, solicitation of decertification petitions and continued protracted litigation. To use the current status of Union representation to relieve the Companies of the bargaining order would only reward the

Companies' unlawful practices. As the Fifth Circuit recognized in *Texas Petrochemicals, supra*, relied upon by the Petitioners here, "an obstinate employer may not benefit from its own wrongs." 923 F.2d at 404. While Board delay has been considered by certain courts of appeals as a factor to balance in considering whether or not to uphold an NLRB bargaining order, this does not create a conflict amongst the circuits nor an important federal question which has not been but should be decided by this Court. *NLRB v. Katz, supra* (bargaining order enforced notwithstanding assertion that Board order issued three years after refusal to bargain). The Court of Appeals considered Board delay here and rejected it on balance as a determining factor in upholding the Board's remedial bargaining order.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE COURT DOES NOT HAVE TO REACH THE QUESTION OF THE APPLICABILITY OF § 10(b) OF THE NATIONAL LABOR RELATIONS ACT, AND FURTHER THE COURT OF APPEALS' APPLICATION OF § 10(b) DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Where the resolution of a conflict or constitutional issue is irrelevant to the ultimate outcome of the case, certiorari may be denied. *Somerville v. U.S.*, 376 U.S. 909 (1964). In the case at hand, it is not necessary for the Court to reach the question of applicability of the § 10(b) of the Act limitations period since the Court of Appeals, relying on *Knapp-Sherril Co.*, 263 NLRB 396 (1982), also held that the Companies were estopped from challenging the merger because they continued to deal normally with the new local until the contracts expired. Since the defense proffered by the Petitioners, i.e. invalidity of the merger would be precluded by either the § 10(b) limitations period or estoppel, the result, affirmance of the decision of the Board, would not change. In

Somerville v. U.S., *supra*, certiorari was denied where it was evidenced that the resolution of the conflict would not change the result reached below because the petitioner would be liable under either federal or state law. *See also, Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129 (1946) (Court refused to decide the constitutional validity of a federal statute, which had been a critical issue below, because of the presence of non-constitutional issues which might alone have served as an adequate ground for disposition of the case).

Assuming, arguendo, that the Court reaches the issue of the applicability of the § 10(b) limitations period, the Sixth Circuit panel's opinion presents no conflict with this Court's decision in *Local Lodge No. 1423 Int'l Ass'n of Machinist v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 416 (1960). A company cannot defend its refusal to recognize a union based on an allegedly invalid merger if the merger occurred outside the § 10(b) limitations period and the employer continued to recognize the union. *Joe Costa Trucking Co.*, 238 NLRB 1516, 1517 (1979), *enf'd sub nom; NLRB v. Edjo, Inc.*, 631 F.2d 604 (9th Cir. 1990). *See also, North Bros. Ford, Inc.*, 220 NLRB 1021 (1975).

III. THE PETITION FOR CERTIORARI SHOULD BE DENIED ON THE "RATIFICATION" ISSUE SINCE IT DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW AND WILL NOT IN ANY WAY EFFECT THE OUTCOME OF THIS ACTION.

The Petitioners contend that Baker Bros. President, Al Baker's ratification of three (3) supervisors' circulation of the decertification petition which took place after the signings cannot constitute ratification. This contention misses the point. As the panel noted, the fact that Al Baker learned of the signings from Supervisor McClellan and had interrogated another employee based on reports from McClellan "supports the inference that McClellan

and the [other supervisors] acted with Baker's approval." Thus, the Sixth Circuit's application of the *Montgomery Ward* test to this case is a proper application of law to fact and does not raise an important question of federal law which has not been but should be decided by this Court. 115 NLRB 645, 647 (1956), *enf'd*, 242 F.2d 497 (2nd Cir.), *cert. denied*, 355 U.S. 829 (1957). Further, this issue would not effect the ultimate outcome of the case and is tangential at best.

CONCLUSION

A Petition for Certiorari will be granted only when there are special and important reasons therefore. Rule 10, Supreme Court Rules. Such circumstances are not present here as previously discussed and therefore Respondent United Food and Commercial Workers Local 1529, AFL-CIO, prays that the Petition for Writ of Certiorari be denied and that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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